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No. 556

In the

SUPREME COURT OF THE UNITED STATES

October Term 1964

SAKRETE OF NORTHERN CALIFORNIA, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The Government has categorized Petitioner's case as raising solely a matter of weighing of the evidence and as thus has attempted to dispose of it on the basis of *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. It is obvious in taking this tact that the Government has misconceived the problem that is presented or, what is more likely, does not want it to come before the Court.

I.

Simply stated, the question is whether or not the National Labor Relations Board may predicate its statutory jurisdiction solely on the basis of application of the so-called "single employer doctrine" arrived at without any showing of effect on commerce, either direct or indirect.

We would think, if the Government feels its position to be a valid one, that it would welcome the clean-cut shot, which this case presents, at the question of clarifying those elements which must be proved to support statutory jurisdiction in the future.

We believe that we are correct in stating the law when we assert that in a labor case the Government may prove jurisdiction in one of two methods:

1) It may prove that the employer involved does, through its own operations, have a direct effect on commerce.

2) It may prove that through functional integration, or otherwise, an employer's activities have such a direct effect on the activities of a different employer whose activities do directly affect commerce that the indirect burden will sustain jurisdiction.

In the present case we believe it may fairly be stated, and we further believe, that the Solicitor General should in the normal candor, which has always been displayed by his office, acknowledge that:

1) The Government did not attempt to nor did they introduce any evidence of, or try to prove any direct effect (or indirect effect) on commerce.

2) The Government did not attempt to nor did they introduce any evidence or try to prove direct effect (or indirect effect) on the interstate employer,

arising from Petitioner's activities or the results of any cessation of Petitioner's activities through labor strife.

The Government appears to have taken the view that in effect by merely waiving a magic wand and calling the two employers together a "single employer" the fact of statutory jurisdiction automatically follows without any rational basis being displayed for making such jurisdiction follow.

First: In connection with this it might be noted that the Government's brief is impressively silent with respect to any authority supporting its proposition that by merely calling a challenged employer and a third person who is not a party to the case a "single employer" jurisdiction can properly be supported.

Second: The case is not a *Universal Camera* problem dealing with the weighing of evidentiary facts but in an evidentiary context is closer to the proposition considered in *Thompson* v. *City of Louisville,* 362 U.S. 199 (1959).

While it may not have been the intention of the Government originally to try this case in this manner, we believe, as we have previously indicated, that this is the way in which they did try it, with no attempt to prove and no evidence being submitted to show the establishment of a burden on commerce by Petitioner's activities, be it direct or be it indirect through the tie-in with another employer.

Third: There is no question but that three of the four elements required by the National Labor Relations Board for the support of the "single employer doctrine" are present and adequately shown. Management, ownership and control are clearly parallel. It is our assertion, however, that without proof and finding of the fourth element verbalized in the test, i. e., that of interrelation of operations —Federal jurisdiction cannot be supported. As the Na-

tional Labor Relations Board itself pointed out in adopting this test the crux of what is sought to be proven, is integration — operational integration which clearly is not and cannot here be demonstrated. See, 21st Annual Report of the Board, pages 14-15.

As we have indicated, we will welcome the Solicitor General's comments on the proposition that the Government can establish jurisdiction merely on the issue of duality of control with complete disregard of the basic question presented, which is effect on commerce.

II.

We notice that the Government has questioned the existence of a conflict between the present case and *National Labor Relations Board* v. *Shawnee Milling Company,* 184 F. 2d 57 (CA 10th). We think that the question posed in this case, i. e., the necessity of taking some minimal steps toward proving effect on commerce by showing operational integration between employers is also the crux of that case and that as such the conflict is abundantly clear.

III.

This Court, on October 12, 1964, granted a Writ of Certiorari in the case of *Radio and Television Broadcast Technicians Local Union 1264, International Brotherhood of Electrical Workers, AFL-CIO, et al.* v. *Broadcast Service of Mobile, Inc.,* No. 61, this term, which as one of its questions raises whether or not the National Labor Relations Board discretionary jurisdiction over an employer may be claimed to exist through the application of the so-called "single employer doctrine."

In No. 61 it is to be noted that the Government relied upon the present case as authority for its position therein and then went on to cite certain other cases holding that discretionary dollar limit jurisdiction may be deemed to

exist through the application of the "single employer doctrine" with respect to an employer which is at the outset concededly subject to the Board's jurisdiction under the Act. There the question of statutory jurisdiction which must be passed prior to getting to the question of discretionary jurisdiction is not an issue.

In the present case statutory jurisdiction is the essential question — not discretionary jurisdiction. The Government, we believe, misconceives this idea with the claim that its assertion of jurisdiction is stronger in the present case (Brief in Opposition, page 7 - Note 3). Actually the Court will note that the present case presents a weaker claim of assertion of jurisdiction, since disposition of the present case in favor of the Government would ipso facto dispose of No. 61 in favor of the Government's position therein while the converse is not true. On the other side of the coin we believe that a holding for Respondent in No. 61 would dispose of the present case in favor of the Petitioner, while the converse is not true.

Accordingly two different applications of the Board's challenged jurisdictional test being presented, we would suggest that the present case be granted and the cases argued together, or alternatively, since No. 61 has already been granted that the present case be held pending disposition of No. 61 to determine whether or not the issues herein are controlled thereby.

Respectfully submitted,

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